

Urban Constructors, Inc. and Urban Organization and Laborers' International Union of North America, Local 478, AFL-CIO. Case 12-CA-16562

March 31, 1999

**SUPPLEMENTAL DECISION AND ORDER
BY MEMBERS FOX, LIEBMAN, AND BRAME**

On April 19, 1996, the National Labor Relations Board issued a Decision and Order in this case¹ directing the Respondent, Urban Constructors, Inc. and Urban Organization, to take certain affirmative action, including making whole Willie Louis and Anele Stanisclas for any loss of earnings they may have suffered as a result of the Respondent's discharge of them in violation of Section 8(a)(3) and (1) of the Act.

On April 29, 1997, the United States Court of Appeals of the Eleventh Circuit entered its judgment enforcing the Board's Order.²

A controversy having arisen over the amount of backpay due the discriminatees under the terms of the Board's Order, the Regional Director for Region 12 issued and served on the Respondent a compliance specification and notice of hearing on August 4, 1998, notifying the Respondent that it must file a timely answer complying with the Board's Rules and Regulations. On September 2, 1998, the Respondent filed an answer to the compliance specification.

On December 4, 1998, counsel for the General Counsel filed with the Board a Motion to Strike Respondent's Answer in Part and for Partial Summary Judgment, with attachments. The General Counsel's motion alleges that the Respondent failed to meet the requirements of Section 102.56 of the Board's Rules and Regulations, specifically with respect to paragraphs 1(a) and (b), 2(a) through (f), and 3(a) through (c) of the specification regarding the duration of the backpay periods, the premises and backpay formulas used, and the computation of gross backpay. The General Counsel contends that these are matters within the knowledge of the Respondent. The General Counsel alleges that the Respondent, in its denials and claims of insufficient knowledge to form a belief regarding the truth or falsity of all but four allegations of the specification, gave only vague explanations, and that the Respondent provided no backpay periods or formulas or figures for the computation of gross and net backpay as alternatives to those used by the Regional Director. The General Counsel further contends that the Respondent's first affirmative defense in its answer should be struck because it involves both matters within the Respondent's knowledge as to which it has offered no supporting argument and matters litigated and resolved in the underlying unfair labor practice proceeding.

¹ 320 NLRB 1166.

² No. 97-4067 (unpublished).

On December 14, 1998, the Board issued an Order Transferring Proceedings to the Board and Notice to Show Cause why the General Counsel's motion should not be granted.

On the entire record in this proceeding, the Board makes the following

Ruling on the Motion to Strike Portions of the Respondent's Answer and for Partial Summary Judgment

Sections 102.56(b) and (c) of the National Labor Relations Board's Rules and Regulations state in pertinent part:

(b) *Contents of answer to specification*—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

(c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specification*—If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

We agree with the General Counsel that the Respondent's answers to paragraphs 1(a) and (b) and 2(a) through (f) of the specification are substantially deficient insofar as the Respondent's answers contain only general denials concerning matters within the Respondent's knowledge relating to the duration of the backpay periods and computation of gross backpay for the discriminatees, and the Respondent gives no alternative backpay periods, wage rates, or alternative gross backpay totals. We also agree with the General Counsel that the Respondent's answers neither admitting nor denying paragraphs 3(a) through (c) of the specification, which state

the arithmetic formulas for the computation of quarterly net backpay, are substantially deficient because the Respondent offered no alternative formulas or any explanation of the alleged defects in the Regional Director's formulas.

Thus, because the Respondent has failed to deny, in a manner prescribed in Section 102.56(b), the allegations concerning the duration of the backpay periods, the premises and formulas used to compute gross and net backpay, and the computations of gross backpay due, or to explain its failure to do so, Section 102.56(c) requires that such allegations be deemed to be admitted to be true.

In its answer, the Respondent offers five affirmative defenses³ to the allegations of the specification. In its first affirmative defense, the Respondent contends that the discriminatees are not entitled to backpay for any and all periods of time in which they would have otherwise been terminated from their jobs because of legitimate nondiscriminatory business reasons, including layoffs of their positions, or termination for poor performance. We agree with the General Counsel that the first affirmative defense should be struck, because the Respondent did not provide any specifics as to legitimate nondiscriminatory business reasons which would have resulted in the termination of either discriminatee during the alleged backpay period. Nor does the Respondent provide any alternative backpay periods for either discriminatee premised upon this portion of its first affirmative defense. Further, the Respondent's argument, in its first affirmative defense, that the backpay periods may be tolled because it would have terminated the discriminatees for poor performance has been fully litigated in the underlying unfair labor

practice proceeding. The Board adopted the administrative law judge's finding that this reason asserted by the Respondent for discharging the discriminatees was pretextual. *Urban Constructors, Inc.*, 320 NLRB at 1166 fn. 1, 1169–1170. The Eleventh Circuit enforced the Board's Order.

Accordingly, for the reasons stated above, we shall grant the General Counsel's Motion to Strike Respondent's Answer in Part and for Partial Summary Judgment. As a result, we shall strike the Respondent's answer with respect to paragraphs 1(a) and (b), 2(a) through (f), and 3(a) through (c) of the specification, and its first affirmative defense and grant summary judgment with respect to all allegations in the specification except paragraphs 3(e), (f), and (g) and 4. We shall direct a hearing limited to determining the amount of interim earnings attributable to the discriminatees, and related matters, and, hence, the Respondent's net backpay liability.

ORDER

It is ordered that the General Counsel's Motion to Strike Respondent's Answer in Part and for Partial Summary Judgment be granted.

IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 12 for the purpose of scheduling a hearing before an administrative law judge limited to the allegations in the specification contained in paragraphs 3(e), (f), and (g) and 4 concerning the amount of interim earnings, and related matters, and net backpay liability.

IT IS FURTHER ORDERED that an administrative law judge prepare and serve upon the parties a decision containing findings, conclusions, and recommendations based on all of the record evidence. Following the service of the administrative law judge's decision on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

³ The other four affirmative defenses relate to the discriminatees' interim earnings and alleged failures to mitigate losses. On those subjects, which are not matters necessarily within the knowledge of the Respondent, a simple denial is sufficient to warrant a hearing. E.g., *Baumgardner Co.*, 298 NLRB 26, 27–28 (1990). The General Counsel accordingly did not seek summary judgment on these.